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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 17

ALEXANDER BOYD, PETITIONER,

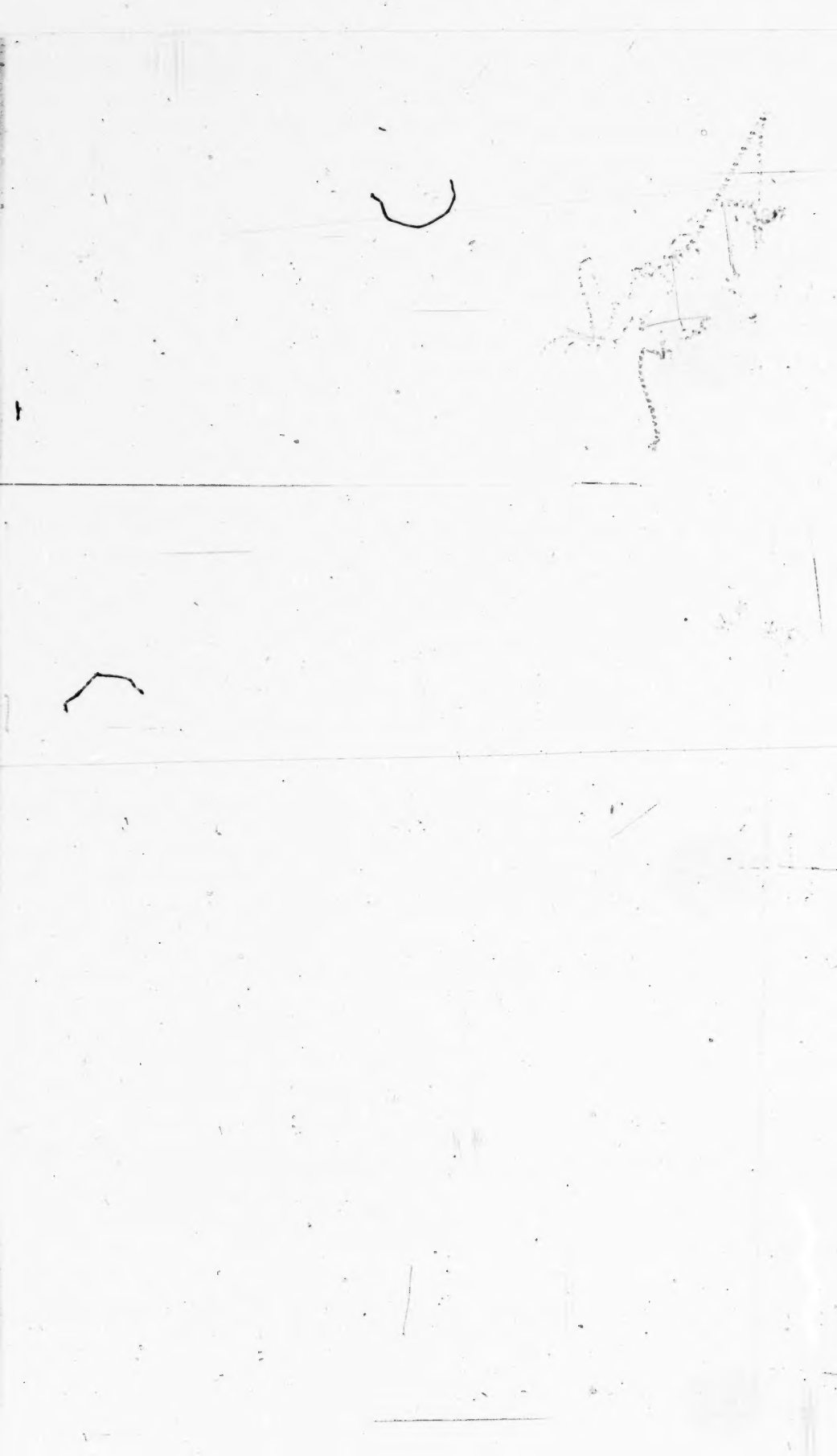
vs.

GRAND TRUNK WESTERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED DECEMBER 29, 1948.

CERTIORARI GRANTED JUNE 6, 1949.



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GRAND TRUNK WESTERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 30, 1949.

—3169

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[fol. 1] [Stamp:] Supreme Court, U. S. Office of the Clerk. Nov. 20, 1948.

43966

Parties: Grand Trunk Western Railroad Company, Plaintiff and Appellant, vs. Alexander Boyd, Defendant.

Plaintiff's Attorneys: George F. Gronewold, Battle Creek.

Defendant's Attorneys, Mechem & Mechem, Battle Creek.

Appeal from Calhoun, in Chancery.

Date	Proceedings
1947	
Nov. 4.	Motion to continue injunction filed.
Nov. 14.	Brief in opposition filed.
Dec. 2.	Restraining order issued.
1948	
Jan. 28.	Record on appeal filed.
Mar. 9.	Note of argument filed.
Apr. 9.	Argued and submitted.
June 29.	Reversed, remanded, no costs.
July 2.	Record returned to Court below.
Aug. 3.	Motion for rehearing submitted.
Oct. 4.	Motion for rehearing denied, costs to plaintiff.
Oct. 12.	Motion for stay of proceedings filed.
Oct. 21.	Motion for stay granted.

[fol. 2] STATE OF MICHIGAN, IN THE SUPREME COURT

Cal. No. 43966

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

GRAND TRUNK WESTERN RAILROAD COMPANY, A Michig[illegible] Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

NOTICE OF HEARING

To: Mechem and Mechem, Melvin L. Griffith, and Walter N. Murray.

Please take notice, that the within Motion to Continue Injunction will be brought on for hearing before the Supreme Court, on the 18th day of November, A. D. 1947, at the opening of Court, or as soon thereafter as counsel may be heard.

Dated: November 18, 1947.

By George F. Gronewold, Attorney for Plaintiff and Appellant.

To: Jay Mertz, Clerk of said Court.

SIR:

Will you please place the within motion on the Docket of this Court for the above specified day.

By George F. Gronewold, Attorney for Plaintiff and Appellant. Business address: 1514 Security National Bank Bldg., Battle Creek, Michigan.

[fol. 3] STATE OF MICHIGAN, IN THE SUPREME COURT

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

GRAND TRUNK WESTERN RAILROAD COMPANY, A Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

PROOF OF SERVICE

COUNTY OF CALHOUN, ss:

George F. Gronewold, being duly sworn, deposes and says that on the 3rd day of November, 1947, at the City of Battle Creek, Michigan, he served a true copy of the attached Notice of Hearing, Motion to Continue Injunction, and Affidavit upon Mechem and Mechem, attorneys for the defendant and appellee in the above entitled cause by handing the said to John Leland Mechem personally, one of the members of said firm; that deponent also served a true copy of the attached Notice of Hearing, Motion to Continue Injunction, and Affidavit upon Melvin L. Griffith and Walter N. Murray by depositing the same in a Government mail receptacle in the City of Battle Creek, Calhoun County, Michigan, enclosed in a sealed envelope, plainly addressed to such attorneys with postage therein fully paid, addressed to their business address at 139 Clark Street, North, Chicago, Illinois, on the 3rd day of November, 1947.

George F. Gronewold.

Subscribed and sworn to before me, a Notary Public, this 3rd day of November, 1947. Kenneth P. Williams, Notary Public, Calhoun County, Michigan. My Commission expires May 20, 1950.

[fol. 4] STATE OF MICHIGAN, IN THE SUPREME COURT

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Cal. No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, A Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

MOTION TO CONTINUE INJUNCTION

Now comes the plaintiff and appellant in the above entitled cause, Grand Trunk Western Railroad Company, and respectfully moves the Court now here to enter an order continuing the injunction issued by the lower court restraining the defendant and appellee from in any manner in assisting, aiding, participating, or engaging directly or indirectly in the prosecution or conduct of the cause of action now pending in the Superior Court of Cook County, Illinois, wherein Alexander Boyd is plaintiff and Grand Trunk Western Railroad Company is defendant being Docket No. 47S10416, for the following reasons:

(a) For the reason that the present action is one to determine whether or not certain contracts entered into between the parties hereto appearing in the Bill of Complaint are valid and enforceable, or null and void.

(b) For the reason that should the Supreme Court of Michigan determine that said contracts are enforceable and valid, plaintiff and appellant would suffer irreparable harm and great damage in the event said defendant and appellee proceeded with his suit in Cook County, Illinois, pending [fol. 5] the determination of this cause and the questions involved upon this appeal would become moot.

This motion is based upon the records and files in this cause and upon this affidavit of George F. Gronewold one of the attorneys for plaintiff and appellant attached hereto and made a part hereof.

Dated: November 3, 1947.

By George F. Gronewold, Attorney for Plaintiff & Appellant. Business Address: 1514 Security National Bank Bldg., Battle Creek, Michigan.

H. Victor Spike, Forbes B. Henderson, of Counsel.

[fol. 6] STATE OF MICHIGAN, IN THE SUPREME COURT

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

GRAND TRUNK WESTERN RAILROAD COMPANY, A Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

AFFIDAVIT

COUNTY OF CALHOUN, ss:

George F. Gronewold being duly sworn, deposes and says that he is one of the attorneys for the plaintiff and appellant in the above entitled cause; that plaintiff's Bill of Complaint and the records and files in said cause show the following:

Plaintiff was operating in the State of Michigan, in both Interstate and Intrastate commerce, that defendant was in its employ and was injured on November 23, 1946 at Battle Creek, Calhoun County, Michigan.

That on December 5 and December 21, 1946, plaintiff advanced defendant the sum of $50.00 on each occasion, and in consideration thereof defendant entered into a contract with plaintiff, providing among other things as follows:

> "If my claim cannot be settled to my satisfaction, and should I wish to start suit against the said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where by injuries were sustained, and not elsewhere."

[fol. 7] That on June 25, 1947, defendant commenced suit against the plaintiff in the Superior Court of Cook County, Illinois, for damages under the Federal Employers' Liability Act, 45 U. S. C. A. Section 51-60.

That on the 17th day of July, 1947, plaintiff filed its Bill of Complaint in the Circuit Court for Calhoun County, Michigan, praying for a temporary and permanent injunction

restraining defendant from maintaining, carrying on or prosecuting any action or proceedings in the State of Illinois or elsewhere except as provided in the above mentioned contract.

A temporary injunction was issued by the Calhoun County Circuit Court on said date and subsequently a motion was made by defendant to dismiss plaintiff's Bill of Complaint, to quash plaintiff's summons and dissolve the injunction.

That on the 27th day of October, 1947, the Calhoun County Circuit Court entered an Order of Dismissal, dismissing plaintiff's Bill of Complaint, quashing said summons and dissolving said temporary injunction.

That on the 29th day of October, 1947, plaintiff filed his Claim of Appeal with the Calhoun County Clerk in the nature of a general appeal to the Supreme Court of the State of Michigan.

Pending said appeal under the situation as it now exists, defendant can proceed with his suit against the plaintiff in the Superior Court for Cook County, Illinois.

That plaintiff will suffer irreparable harm and great damage unless defendant is restrained from proceeding with his said suit in the Superior Court for Cook County, Illinois during the pendency of this appeal.

Further deponent say as not.

George F. Gronewold.

Subscribed and sworn to before me this 3rd day of November, 1947. Kenneth P. Williams, Notary Public, Calhoun County, Michigan. My commission expires May 20, 1950.

[fol.[8]] THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

Proof of Service

COUNTY OF CALHOUN, ss.

J. L. Mechem, being duly sworn, deposes and says that he resides in the City of Battle Creek, in said County, is a member of the firm of Mechem & Mechem, attorneys of record for the defendant and appellee in the above entitled cause.

That on the 13th day of November, 1947, he served the within Answer to Motion to continue Injunction on George F. Gronewold, E. Victor Spike and Forbes B. Henderson, attorneys for the above-named plaintiff and appellant, by depositing true copies of the same in the Postoffice in the City of Battle Creek, Michigan, enclosed in sealed envelopes, with postage thereon fully prepaid, and plainly addressed to said attorneys at their respective business addresses.

J. L. Mechem.

Subscribed and sworn to before me, a Notary Public in and for said County, this 13 day of November, A. D. 1947. Sadie S. Clemons. My commission expires Feb. 12, 1949.

[fol. 9] IN THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

Answer to Motion to Continue Injunction

Comes Now Defendant and Appellee, Alexander Boyd, and in answer to the Motion of the above-named Appellant to continue the injunction issued in the lower court says:

(1) The invalidity under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51-60) of certain contracts between the parties hereto, is one of the questions determined by the decision of the lower court herein.

(2) Appellee denies that any harm or damage will result to Appellant, if Appellee proceeds with his suit for damages now pending in Cook County, Illinois.

Appellee Prays that said Motion be denied.

Dated: November 10, 1947.

Mechem & Mechem, by J. L. Mechem, Attorneys for Defendant and Appellee, Business Address: 804 Michigan National Bank Building, Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel. Business Address: 139 No. Clark Street, Chicago 2, Illinois.

[fol. 10] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the second day of December, in the year of our Lord one thousand nine hundred and forty-seven.

Present the Honorable Leland W. Carr, Chief Justice; Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Associate Justices.

43966

GRAND TRUNK WESTERN RAILROAD COMPANY, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant

In this cause a motion is filed by plaintiff for an order continuing the injunction heretofore issued herein in the Circuit Court for the County of Calhoun, in Chancery, and a brief in opposition thereto having been filed by defendant, and due consideration thereof having been had by the Court, It is ordered that the said defendant be and he is hereby restrained from in any manner assisting, aiding, participating, or engaging directly or indirectly in the prosecution of conduct of the cause of action now pending in the Superior Court of Cook County, Illinois, wherein Alexander Boyd is plaintiff and Grand Trunk Western Railroad is defendant, being Docket No. 47S10416, pending the determination of the appeal in this cause to this Court.

STATE OF MICHIGAN, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my ~~hand~~ and affixed the seal of said Supreme Court at Lansing, this 22nd day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Jay Mertz, Clerk.

[fols. 10-13] IN CIRCUIT COURT OF CALHOUN COUNTY

CALENDAR ENTRIES

Date	Proceedings
1947	
July 17,	Filed bill of complaint.
July 17,	Issued summons.
July 17,	Issued injunction.
July 17,	Filed bond.
July 30,	Filed Defendant's appearance.
July 30,	Motion to dismiss Plaintiff's bill of complaint and to quash Plaintiff's summons and dissolve injunction.
Sept. 5,	Summons and injunction served.
Oct. 8,	Petition for leave to amend Defendant's motion to dismiss Plaintiff's bill of complaint and notice of hearing.
Oct. 10,	Proof of service of copy of Defendant's motion for leave to amend motion to dismiss.
Oct. 10,	Order granting leave to amend Defendant's motion to dismiss.
Oct. 20,	Finding and order granting Defendant's motion to dissolve the temporary injunction heretofore issued. Quash the summons and dismiss Plaintiff's bill of complaint.
Oct. 20,	Plaintiff's brief.
Oct. 20,	Brief.
Oct. 20,	Brief.
Oct. 27,	Order of dismissal.

[fol. 14] IN THE SUPREME COURT OF MICHIGAN

Appeal from the Circuit Court for Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Cal. No. 42352

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

STIPULATION RE SETTLEMENT OF CASE OF APPEAL

It is hereby stipulated and agreed that the attached case made on appeal shall be settled and signed by the Court as therein set forth, and that an order may be entered by the Court in accordance with this Stipulation.

Dated at Battle Creek, Michigan, this 15th day of January, 1948.

George F. Gronewold, Attorney for Plaintiff.
Mechem & Mechem, Attorneys for Defendant.

[fol. 15] IN CIRCUIT COURT OF CALHOUN COUNTY

IN CHANCERY

[Title omitted]

CLAIM OF APPEAL

Now comes the plaintiff herein, Grand Trunk Western Railroad Company, and claims an appeal from the order entered in said cause on the 27th day of October, 1947, by the Circuit Court for said County.

The appellants make appeal in the nature of a general appeal from said order.

Dated at Battle Creek, Calhoun County, Michigan, this 29th day of October, 1947.

George F. Gronewold, Attorney for Plaintiff. Business Address: 1514 Security National Bank Bldg., Battle Creek, Michigan.

H. Victor Spike, Forbes B. Henderson, of Counsel. 441 E. Jefferson Avenue, Detroit, Michigan.

[fol. 16] IN THE SUPREME COURT OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

[Title omitted]

REASONS AND GROUNDS FOR APPEAL

The plaintiff and appellant, Grand Trunk Western Railroad Company appeal from the order granting defendant's motion, and the Order of Dismissal for the following reasons:

(1) The trial court erred in holding that the contracts entered into between plaintiff and defendant are void under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., Section 55 and 56.

(2) The court erred in holding that the contracts entered into between plaintiff and defendant did not furnish a sufficient basis for injunctive relief.

Dated the 15th day of January, 1948.

George F. Gronewold.

[fol. 17] IN CIRCUIT COURT OF CALHOUN COUNTY, IN CHANCERY

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff,

vs.

ALEXANDER BOYD, Defendant

BILL OF COMPLAINT—Filed July 17, 1947

Now comes Grand Trunk Western Railroad Company, a Michigan Corporation, hereinafter known as plaintiff, and respectfully shows unto the Court as follows:

1. Plaintiff now is, and continuously for more than ten years past has been, a corporation duly organized and existing under the laws of the State of Michigan, and has its principal office in the City of Detroit, Mich., and during said time has owned and operated and now

owns and operates, various lines of steam railroad extending into the State of Michigan as well as in other States of the United States, and has generally engaged in the business of conducting a steam railroad in both interstate and intra-state commerce.

2. Alexander Boyd, defendant herein, appears as plaintiff in a certain action now pending in the Superior Court of Cook County, Illinois, which is hereinafter referred to and more particularly indentified. Said defendant is a resident of East LeRoy, Calhoun County, [fol. 18] Michigan, and was a resident of East LeRoy at all the times hereinafter mentioned.

3. On or about November 23, 1946, at about 7:30 P. M. the said defendant suffered an injury while pulling an operating lever on a railroad car and the knuckle lock disconnected causing defendant to lose his balance and falling to the ground; which occurred in plaintiff's Nichols Yards in the City of Battle Creek, Calhoun County, Michigan.

4. Immediately after said injury defendant was given medical care and treatment at the expense of this plaintiff.

5. Subsequently defendant stated to plaintiff, on or about December 5, 1946, that he was without funds for living expenses, pending his ultimate recovery, and requested plaintiff to advance him funds: whereupon plaintiff did advance funds to defendant, in the amount of Fifty Dollars, in consideration of which defendant signed an agreement, on the date aforesaid, to-wit, December 5, 1946, providing that in consideration of said advancement, he agreed:

> "1. That I will endeavor in good faith to settle any claim I may have for my said injuries.
>
> "2. If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained and not elsewhere."

A copy of said agreement is attached hereto, marked Exhibit "A", and made a part hereof.

[fol. 19] 6. On December 21, 1946 defendant represented to plaintiff that he was in further need of funds for living expenses, and requested plaintiff to advance him additional funds; whereupon plaintiff did advance to defendant the additional sum of Fifty Dollars, in consideration of which defendant signed a second agreement, dated December 21, 1946, containing provisions identical with those hereinabove quoted. A copy of said second agreement dated December 21, 1946, is attached hereto, marked Exhibit "B" and made a part hereof.

7. Not withstanding the agreements aforesaid, defendant commenced an action against the plaintiff about June 25, 1947, in the Superior Court of Cook County, Illinois, to recover damages for the injuries alleged to have been sustained as aforesaid, all contrary to the express terms of the aforesaid agreements. Said action is identified in said court as No. 47 S 10416. A copy of the summons issued in said cause is hereto attached, marked Exhibit "C".

8. Great and irreparable harm will be done to plaintiff if it is compelled to defend said suit in the courts of Chicago, Illinois. All the witnesses who are familiar with the facts pertaining to the alleged cause of action set forth in the complaint so filed in Cook County, Illinois, reside either in Calhoun County, Michigan or the State of Michigan. Plaintiff is informed and believes, and therefore avers that none of the witnesses familiar with the facts of said alleged cause of action reside in the State of Illinois or outside of the State of Michigan.

9. This plaintiff could have been, and can now, be compelled to answer an action or legal proceedings brought by the defendant in Calhoun County, Michigan, and in the event of a judgment against this plaintiff, in favor of defendant, in any of the courts of Michigan, [fol. 20] this plaintiff can be compelled by legal proceedings to pay such judgment.

10. There are many persons who would be competent witnesses for this plaintiff on the trial of said cause of action so set up by this petition filed by this defendant herein in Cook County, Illinois, all of whom know facts

material to the trial of said cause of action. The exact number of such persons this plaintiff cannot now state, but it is believed that the number would be ten or more. All of said witnesses, were, on November 23, 1946, and still are residents of the State of Michigan. If plaintiff is compelled to defend said action in Cook County, Illinois, it will not be able to compel the attendance of any of such persons or witnesses; and this plaintiff does not know whether such witnesses would go voluntarily into the State of Illinois to testify for this plaintiff. If such witnesses would express a willingness to go into the State of Illinois to testify, this plaintiff could not rely upon such expressed willingness and even if this plaintiff could take such witnesses to the City of Chicago in Cook County, Illinois, where such action is filed, to attend the trial thereof, it would impose upon plaintiff large and unwarranted expense.

11. This plaintiff would be under great disadvantage in trying said cause in the City of Chicago, Cook County, Illinois, if it should be unable to produce such witnesses in person at the trial. In view of the nature of the action brought by said defendant, in said City of Chicago, and the variety and extent of the testimony which may be offered in support of the claims set up in said action, it is of great importance to this plaintiff that its witnesses be present in person in order that the jury may hear their testimony and observe them while so testifying; and it is therefore of great importance to this plain-[fol. 21] tiff that it not be required to depend upon depositions in the trial of said cause.

12. This plaintiff would also suffer great disadvantage in the trial of said cause in said City of Chicago by reason of the difficulty of securing the presence there of witnesses whose testimony might be of value in rebuttal of testimony introduced by said defendant, in such trial, which witnesses might easily be obtained if such action were tried in Calhoun County, Michigan.

13. This plaintiff would also be subjected to the risk of having its witnesses, before or at the time of trial, fail or refuse to attend the trial, although having previously agreed to do so, thus depriving this plaintiff of the benefit of their testimony altogether by reason of its

inability to compel their attendance or to obtain their depositions on such short notice. Furtherfore, the witnesses of said defendant Boyd, the plaintiff in said action, would be more readily accessible to Calhoun County, Michigan.

14. This plaintiff will be put to very great inconvenience and expense and will suffer every considerable disadvantage if compelled to try said cause in said City of Chicago by reason of its being obliged to transport and maintain there such of its witnesses as may be willing to appear and testify in said court, if there be any such, and by reason also of being obliged to pay them such compensations as they may demand, and this plaintiff will be prejudiced before a jury by reason of having paid such transportation and compensation. Practically all the expenses and danger of not being able to obtain and secure the attendance of said witnesses will be obviated if this case is tried in Calhoun County, Michigan, in accordance with the terms of said agreements marked "Exhibit A", and "Exhibit B".

[fol. 22] 15. If plaintiff is compelled to defend said action in Cook County, Illinois, it will also suffer great inconvenience and expense by reason of the necessity of removing and transporting to Chicago, its operating records, all of which are, in the usual course of its business, lodged in, and currently used in, Battle Creek, and Detroit, Michigan.

16. Plaintiff is informed and believes, and therefore avers, that said action was brought against it in said City of Chicago, Cook County, Illinois, for no other reason or purpose than to cause great inconvenience, expense and damages to plaintiff, and in order that the defendant herein, might secure an inequitable, unjust and unconscionable advantage over this plaintiff, as herein set forth.

17. Plaintiff further avers that this petition is not filed in the purpose of delay, but for the purpose of compelling the defendant herein, to bring his action in accordance with the terms of said agreement in Calhoun County, Michigan, where he has resided for many years last past and where the accident occurred. By reason of all the facts herein alleged, the prosecution of the action above

referred to in the Superior Court of Cook County, Illinois, and the trial of said action in said court, does now, and will hereafter place an unreasonable burden upon this plaintiff, and does now, and will hereafter unreasonably, inequitably and unfairly harass and oppress this plaintiff.

18. Unless the defendant be restrained immediately upon filing of this action from prosecuting his action in said Superior Court of Cook County, Illinois, plaintiff, which is the defendant in said action, will be required to submit to the jurisdiction of said Superior Court of Cook County, Illinois, and this plaintiff will thereby suffer great and irreparable injury.

[fol. 23] 19. This plaintiff has no adequate remedy at law and its rights can only be protected in equity.

20. An emergency exists for the granting by this Court, without notice to the defendant, Boyd, of an immediate restraining order against him, restraining him from the further prosecution of said action in said Superior Court of Cook County, Illinois, or in any other court outside of Calhoun County, Michigan, which injunction, after hearing, should be made permanent; and unless the said defendant be so restrained, this plaintiff will be irreparably damaged.

Wherefore plaintiff prays:

a. That the said defendant may be required to make full, true, direct and perfect answer to all and singular matters hereinbefore stated and charged, but not under oath (his answer under oath being hereby expressly waived).

b. That a temporary injunction may be issued, without notice, restraining and enjoining the defendant from maintaining, carrying on, or prosecuting, in any way, any action or proceeding in the State of Illinois, or elsewhere than in Calhoun County, Michigan, as provided in said agreements, against this plaintiff, to recover damages growing out of the alleged injuries claimed to have been sustained by defendant in Calhoun County, Michigan, on November 23, 1946, and in particular, from in any manner asserting, aiding, participating, or engaging in, the prosecution of the aforesaid action brought by him and now pending in the Superior Court of Cook County, Illinois.

c. That upon the final hearing hereof said temporary injunction be made permanent.

[fol. 24] d. That plaintiff may have such other relief as may be just and equitable in the premises.

George F. Gronewold, Attorney for Plaintiff, Grand Trunk Western Railroad Co.

Duly sworn to by George F. Gronewold. Jurat omitted in printing.

[fol. 25] EXHIBIT "A" TO BILL OF COMPLAINT

Grand Trunk Western Railroad Company

Agreement for Advancement of Funds Prior to Determination of Liability

PIR 56087. Draft No. 3645

At my request the Grand Trunk Western Railroad Company has this day advanced to me the sum of Fifty Dollars ($50.00) for living and other expenses while I am disabled for work on account of injuries sustained by me at or near Battle Creek, Michigan, on or about the 23rd day of November, 1946, while employed as a switchman.

In consideration of said advancement I agree as follows:

1. That I will endeavor in good faith to settle any claim I may have for my said injuries.

2. If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained and not elsewhere.

3. That all sums of money now or hereafter advanced to me by said Railroad Company shall be deducted from any [fol. 26] sum which shall finally be paid to me by said Railroad Company, either in settlement or as a satisfaction of judgment, or otherwise, on account of said injuries.

4. That the advancement of this or any other sum of money to me, and its acceptance by me, shall not be con-

sidered either as an admission of liability on the part of said Railroad Company, or as a waiver of any right that I may have to recover damages from said Railroad Company for said injuries.

Dated at Battle Creek, Michigan, this 5th day of December, 1946.

Alexander Boyd.

Witnesses: T. O. Leveille, Eunice N. Haaf.

EXHIBIT "B" TO BILL OF COMPLAINT

Grand Trunk Western Railroad Company Agreement for Advancement of Funds Prior to Determination of Liability

PIR 56007. Draft No. 3788

At my request Grand Trunk Western Railroad Company has this day advanced to me the sum of Fifty Dollars ($50.00) for living and other expenses while I am disabled for work on account of injuries sustained by me at or near Battle Creek, Michigan, on or about the 23rd day of November, 1946 while employed as a Yardkeeper.

In consideration of said advancement I agree as follows:

[fol. 27] 1. That I will endeavor in good faith to settle any claim I may have for my said injuries.

2. If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained, and not elsewhere.

3. That all sums of money now or hereafter advanced to me by said Railroad Company shall be deducted from any sum which shall finally be paid to me by said Railroad Company, either in settlement or as satisfaction of judgment, or otherwise, on account of said injuries.

4. That the advancement of this or any other sum of money to me, and its acceptance by me, shall not be considered either as an admission of liability on the part of

said Railroad Company, or as a waiver of any right that I may have to recover damages from said Railroad Company for said injuries.

Dated at Battle Creek, Michigan this 21st day of December, 1946.

Alexander Boyd.

Witnesses: Frank J. Karas, T. O. Leveille.

[fol. 28] Exhibit "C" to Bill of Complaint

Jury Demanded

In the Name of the People of the State of Illinois in the Superior Court of Cook County, Illinois

Alexander Boyd, Plaintiff,

vs.

Grand Trunk Western Railroad Company, a Corp., Defendant

To the above named Defendant:

You are hereby summoned to answer the complaint in the above entitled cause.

Take notice that you must file your answer or otherwise make your appearance in said Court held in the Courthouse in the City of Chicago, Illinois, on Monday, July 21, A. D. 1947 provided this writ shall be served upon you not less than 20 days before said date, but if this writ shall be served upon you less than 20 days before said date, and if served 20 days before Monday, August 4, A. D. 1947 you shall file your answer or otherwise make your appearance on said last mentioned date.

If you do not appear according to the command of this writ, plaintiff may take judgment against you by default. [fol. 29] This summons must be returned, in person or by mail, by the officer or other person to whom it was given for service, with endorsement thereon of service and fees, if any, not later than 5 days after service and in no event later than the date first above named.

Witness, Henry Sonnenschein, the Clerk of said Court and the seal thereof, at Chicago, Illinois, this June 25, 1947 *day of June, 1947.*

Henry Sonnenschein, Clerk. (Seal.)

Plaintiff's Attorney (of Plaintiff, if he be not represented by Attorney): Edward B. Henalee, Address: 139 N. Clark St., Telephone State 5925.

[fol. 30] In Circuit Court of Calhoun County

In Chancery

[Title omitted]

Injunction—Filed July 17, 1947

In the Name of the People of the State of Michigan:

To: Alexander Boyd, and to his counsellors, attorneys and agents, and each and every one of them, Greeting:

Whereas, It has been represented to us, in the Circuit Court for the County of Calhoun, in Chancery, on the part of Grand Trunk Western Railroad Company, a Michigan Corporation, Plaintiff, that it has been lately exhibited its Bill of Complaint against you the said Alexander Boyd, Defendant, to be relieved, touching the matters therein complained of; in which Bill it is stated, among other things, that you are combining and confederating with others to injure the said Plaintiff touching the matters set forth in the said Bill, and that your actings and doings in the premises are contrary to equity and good conscience; we, therefore, in consideration thereof, and of the particular matters in the said Bill set forth, do strictly command you, the said Alexander Boyd and the persons before mentioned, [fol. 31] and each and every one of you, under the penalty of Ten Thousand Dollars ($10,000.00) to be levied on your lands, goods and chattels, to our use, that you do absolutely and refrain from in any manner assisting, aiding, participating or engaging, directly or indirectly, in the prosecution or conduct of the cause of action now pending in the Superior Court of Cook County, Illinois, wherein Alexander Boyd is plaintiff and said Grand Trunk Western Railroad

Company is defendant, being No. 47 S 10416 in said Court, or from instituting, maintaining, carrying on or prosecuting, in any way, any other action or suit against said Grand Trunk Western Railroad Company in any county or district other than the county or district where said Alexander Boyd resided at the time the claimed injuries were sustained, to-wit: Calhoun County, Michigan, or the county or district where said injuries were sustained, to-wit, Battle Creek, Calhoun County, Michigan, for damages by reason of injuries claimed to have been sustained by said Alexander Boyd in the Nichols Yards at Battle Creek, Calhoun County, Michigan on or about November 23, 1946, until the further order of this Court.

Witness, The Honorable Blaine W. Hatch, Circuit Judge, and the seal of said Circuit Court at Battle Creek, Michigan, this 17th day of July, 1947.

Edward J. Morse, Clerk. Herbert Mehler, Deputy Clerk.

George F. Gronewold, Attorney for Plaintiff. Business Address: 1514 Security National Bank Bldg., Battle Creek, Michigan.

[fol. 32] IN CIRCUIT COURT OF CALHOUN COUNTY
IN CHANCERY

[Title omitted]

MOTION TO DISMISS PLAINTIFF'S BILL OF COMPLAINT AND TO QUASH PLAINTIFF'S SUMMONS AND DISSOLVE INJUNCTION —Filed July 30, 1947

Comes Now Alexander Boyd, the above named defendant, by Mechem & Mechem, his attorneys, and moves this Honorable Court to dismiss the above-named plaintiff's Bill of Complaint in the aforesaid cause and to quash the summons and to dissolve the injunction therein issued, for the following reasons:

(1) That the said plaintiff's said Bill of Complaint does not state a cause of action, which would entitle said plaintiff to any relief.

(2) The aforesaid court does not have the power or jurisdiction to interfere with, or stay proceedings in an

action lawfully commenced under the Federal Employers Liability Act (45 U.S.C.A. Sections 51-60) prior to the beginning of the above-entitled cause, in a court of competent jurisdiction, to wit: the Superior Court of Cook County, State of Illinois.

[fol. 33] (3) Assuming for the sake of this motion, that all averments in said Bill of Complaint are true, nevertheless said Bill of Complaint does not state grounds upon which the above-entitled court could stay proceedings under the said Federal Employers Liability Act, lawfully theretofore commenced in a court of competent jurisdiction, to-wit: said Superior Court of Cook County, Illinois.

(4) It appears from said Bill of Complaint that said plaintiff has an adequate remedy of law.

This motion is based on the files and records of the above-entitled cause.

Dated July 30, 1947.

Mechem & Mechem, Attorneys for Defendant. Business Address: 804 Michigan Nat'l Bank Bldg., Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel for defendant. Business Address: 139 N. Clark Street, Chicago, Illinois.

[fol. 34] In Circuit Court of Calhoun County
In Chancery

[Title omitted]

Petition for Leave To Amend Motion To Dismiss—Filed October 8, 1947

Comes Now Alexander Boyd, the above-named defendant, by Mechem & Mechem, his attorneys, and asks leave to amend his Motion to dismiss plaintiff's Bill of Complaint, which motion was heretofore filed on July 30, 1947, by adding the following paragraph to stand as Paragraph (5) of said Motion:

"(5) The effect of the agreements set up in the Bill of Complaint is to exempt the plaintiff from a liability

created by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 56) and that they are void to that extent under Section 5 of said Act (45 U. S. C. A. Section 55)."

[fol. 35] This petition is based on the files and records in the above-entitled cause.

Dated: October 7, 1947.

Mechem & Mechem, Attorneys for Defendant. Business Address: 805 Michigan Nat'l Bank Bldg.; Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel for Defendant. Business Address: 139 N. Clark Street, Chicago, Illinois.

[fol. 36] In Circuit Court of Calhoun County
In Chancery

[Title omitted]

Order Granting Leave to Amend Defendant's Motion to Dismiss—Filed October 10, 1947

At a session of said Court held in the Circuit Court, in the City of Battle Creek, in said County, this 10th day of October, 1947.

Present: The Honorable Blaine W. Hatch, Circuit Judge.

On reading and filing the petition of Alexander Boyd, the above-named defendant, for leave to amend his Motion to dismiss Plaintiff's Bill of Complaint, and after argument of the said matter, and the Court being fully advised in the premises: and

It appearing that said amendment asked is proper and should be permitted:

It Is Ordered that the said defendant's Motion to dismiss plaintiff's Bill of Complaint, which action was filed on July 30, 1947, be and is hereby amended by adding a paragraph to stand as Paragraph (5) of said Motion as follows:

"(5) The effect of the agreements set up in the Bill of Complaint is to exempt the plaintiff from a liability [fol. 37] created by Section 6 of the Federal Employers'

Liability Act (45 U. S. C. A. Sec. 55) and that they are void to that extent under Section 5 of said Act (45 U. S. C. A. Section 55)."

Blaine W. Hatch, Circuit Judge.

In Circuit Court of Calhoun County

In Chancery

[Title omitted]

Finding and Order Granting Defendant's Motion to Dissolve the Temporary Injunction Heretofore Issued, Quash the Summons and Dismiss Plaintiff's Bill of Complaint—Filed October 20, 1947

In this suit plaintiff seeks to enjoin the defendant from prosecuting an action in the Superior Court of Cook County, Illinois, or elsewhere than in the county or district in which the defendant Alexander Boyd, resides, to recover damages for injuries suffered by defendant in the course of his duties [fol. 38] as an employee of plaintiff in its Nichols Yards in the City of Battle Creek, Michigan on November 23, 1946.

The allegations of the bill of complaint, briefly stated are as follows: That plaintiff is a corporation duly organized and existing under the laws of the State of Michigan, with its principal offices in the City of Detroit, Michigan: that it owns and operates various lines of steam railroad extending into the State of Michigan as well as other States of the United States, and is engaged in conducting a steam railroad in both interstate and intrastate commerce.

That defendant Alexander Boyd is a resident of East LeRoy, Calhoun County, Michigan, and was such a resident on November 23, 1946 at the time the accident and his injuries occurred.

That defendant at about seven-thirty p. m. on November 23, 1946, suffered an injury in plaintiff's Nichols Yards in the City of Battle Creek, Calhoun County, Michigan, to-wit: while pulling an operating lever on a railroad car, the knuckle lock disconnected, causing defendant to lose his balance and fall to the ground.

The bill further alleges that subsequent to the accident and defendant's injuries, the defendant was without funds,

for living expenses and requested plaintiff to advance him funds; that defendant on each of two occasions on December 5, 1946 and December 21, 1946 advanced him Fifty Dollars, and on each occasion defendant signed an agreement providing that in the event his claim could not be settled satisfactorily to him and suit became necessary:

> "Such suit shall be commenced within the county or district where I resided at the time my injuries were sustained, or in the county or district where my injuries were sustained and not elsewhere."

[fol. 39] Said agreements contained the further provisions:

> "That all sums of money now or hereafter advanced me by said Railroad Company shall be deducted from any sum which shall finally be paid to me by said Railroad Company, either in settlement or as a satisfaction of judgment, or otherwise, on account of said injuries."

It is further alleged in paragraph seven of said bill of complaint that on June 25, 1947 the defendant, in violation of his said agreement filed suit in the Superior Court of Cook County, Illinois, to recover damages for the injuries received by him in said accident, and that said Illinois suit is identified as Number 47 S 10416 in the Superior Court of Cook County.

Plaintiff's bill of complaint further alleges that great expense, inconvenience and irreparable harm will be done plaintiff if it is compelled to defend suit in the courts of Chicago, Illinois. That all the witnesses in the suit reside in Michigan and not in Illinois.

Defendant filed his motion on July 30, 1947 to dissolve the temporary injunction heretofore issued in this suit on July 17, 1947 and to quash the summons and dismiss said suit.

The main question to be decided in the validity of the contracts entered into by plaintiff and defendant and their sufficiency as a basis for injunctive relief in view of the provisions of 45 U. S. C. A. Sections 55 and 56.

The Illinois suit was brought under the Federal Employers' Liability Act, 45 U. S. C. A., Section 51-60, and the Federal Safety Appliance Acts, 45 U. S. C. A., Sections 1-16, and alleges that the defendant Grand Trunk Western

Railroad Company operates a system of railroad lines [fol. 40] running through the States of Michigan and Illinois, and that one of its lines runs into Chicago, Cook County, Illinois, where it maintains an office in charge of officers and agents upon whom service of process may be had.

45 U. S. C. A., Section 56, provides as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States, under this chapter, shall be concurrent with that of the courts of the several states, and no case arising under this chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

It is apparent from said section that defendant Alexander Boyd had a right to file his suit in the Superior Court of Cook County, Illinois, unless he is prohibited from so doing by the agreements he entered into with the plaintiff.

The question of the validity of said agreements depends upon the provision of 45 U. S. C. A. Section 55 which section provides as follows:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *."

It is the contention of the plaintiff herein that said agreements signed by defendant do not come within the terms of [fol. 41] said Section 56, as the intent and purpose of said agreements is not to release the employer from any liability under the terms of this chapter relative to Federal Employer Liability Act: that liability as therein used refers merely to the employers' liability to respond to damages and does not refer to the question of jurisdiction or venue which is a matter of privilege, which defendant had a right to waive.

It is the contention of defendant that the agreements signed by defendant do not come within the terms of said Section 55 and the intent and purpose of the agreements

was to enable the employer to exempt himself from liability created by this chapter relative to Federal Employers Liability Act, to-wit: venue or jurisdiction. They contend that Section 56 of said chapter does create a liability as to the employer: that it must submit to suit in any district in which it is doing business: that said provisions as to jurisdiction or venue are a statutory right created in behalf of the employee and cannot be limited to contract in face of a specific statute which prohibits such a contract.

This suit therefore involves a construction of 45 U. S. C. A. Sec. 55-56.

The respective parties to this controversy have filed lengthy and very comprehensive briefs and after reading same and listening to arguments of counsel, it appears that the Supreme Court has not passed upon the precise question here involved. However, various United States District Courts and State Courts have passed upon same and are divided as to whether or not such an agreement as the ones in the case at bar, limiting the venue as granted in Section 56 of said section are prohibited by Section 55 of said chapter and are therefore void.

[fol. 42] After a thorough consideration of said decisions, I am inclined to agree with those jurisdictions which hold that said contracts or agreements seeking to limit jurisdiction or venue as provided for under Section 56 of said chapter are void under the provisions of Section 55.

As was said by the Supreme Court of Utah in the case of Peterson vs. Ogden Railway and Depot Company, 176 PAC (2nd) 744 (1946) in denying validity to a similar contract there involved.

> "It is apparent that Congress by the use of the very broad terms of Section 5 intended to protect fully the rights given employees by the Chapter. The Section says 'any' device whatsoever the purpose or intent of which shall be to enable the carrier to exempt itself from 'any' liability created by the chapter shall to that extent be void. The Supreme Court of the United States in Duncan v. Thompson, January, 1942, 315 U. S. C. A. 1, 62 S. Ct. 422, 86 L. Ed. 565, held the section applied to contracts made after the cause of action arose as well as those made before. Regardless of the intention of the parties, the contract or device is void. Philadelphia, B & W R. Co. vs. Schubert, 224 U. S.

603, 32 S. Ct. 589, 56 L. Ed. 911; McAdow vs. Kansas City Western R. Co., 100 Kan. 309, 164, P. 177 L. R. A. 1917 E. 539; Larson v. Lewis-Simas-Jones Co., 29 Cal. App. 2nd. 83, P. 2d. 296. • • •

"Section 6 makes available to the plaintiff several courts in which he may bring the action. Clearly that section gives the employee substantial benefits. It was not only for his convenience and to enable him to choose a court where the expense of litigation would not be [fol. 43] prohibitive but it was to give him the right to select the court in which he considers it would be more advantageous for him to bring his action. • • •

"The defendant contends that the plaintiff exercised his right to choose the court in which to bring his action by entering into the contract and, inasmuch as the plaintiff had the right to choose and exercised that right by choosing the federal court, Section 5 and 6 of the Act are not contravened by the contract.

"The spirit and the letter of the Act require that an injured employee be left free and uninfluenced by the carrier in selecting the court in which to bring his action. The liableness to a judicial pronouncement of liability in any of the courts enumerated in Section 6 of the Federal Employers' Liability Act is itself a 'liability' as that word is used in Section 5 of the Act. Hence so much of the contract as attempts to limit the courts in which plaintiff may bring his suit is void under Section 5 and should not be enforced."

In the case of Sherman vs. Pere Marquette Ry. Co., 62 Fed. Supp. 590 (1945) the Court, in holding a similar agreement or contract relative to venue void, said:

"The comprehensive phraseology of Section 5 certainly includes within its meaning a contract the purpose or intent of which is to enable the common carrier to exempt itself from liability to suit for a violation of the Act 'in the district • • • in which the defendant shall be doing business at the time of commencing such action.' The beneficial effects of the statute should not be whittled away by the courts by dis- [fol. 44] tinguishing between adjective and substantive rights and adjective and substantive duties or liabilities. Adjective rights and their co-relative duties or

liabilities are frequently as important as substantive rights, and substantive rights and their co-relative duties or liabilities are of little value without adjective rights and their correlative duties or liabilities whereby the substantive rights are enforced. (It has been said that the word 'liability' in Section 5 is limited to the liability of the carrier to respond in damages, but when we say that we beg the real question, which is as to the meaning of the word 'liability' in Section 5. It is said that venue is a privilege that may be waived, and that the case of Neirbo Co. v. Bethlehem Corp., 308 U. S. 165 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437 lends support to the view). Generally speaking, venue is a privilege which may be waived, but it may not be contracted away in the face of a specific statute which prohibits such contracting, as does Section 5 of the Employers Liability Act under consideration."

In the case of Fleming vs. Husted, 68 F. S. 900 (1946) the Court in finding a similar contract void, said:

"It seems plain to me that Congress did not intend to limit the right to voiding a contract limiting liability under the act to the liability under paragraph one of the Act, but that it is on all obligations created by the Act or against the employer, and I cannot conscientiously determine and find these contracts were valid contracts. Venue is easy to be waived, we all know that is true, but it has nothing to do with this case. Here we have a statutory right created and broadened by the Act itself, and that statutory right creates an addi- [fol. 45] tional obligation to the part of the employer, and also brings with it the prohibition against entering into a contract to limit that right as being void under Section Five of Act 45 USCA Paragraph 55."

There can be no doubt that Congress in passing Section 55 intended it to be very comprehensive, as was held by Justice Black in the case of Duncan vs. Thompson, 315 U. S. 1, 62 S. Ct. 422, 424 (1942). The wording, any contract, any common carrier and any liability clearly points out that Congress had in mind to stop any device by any carriers to evade any obligation created by the act. It did not refer alone to their liability to respond in damages, but any liability created by the Act. Therefore, any contract

or device that sought to exempt any common carrier from any liability, as created by Section 56, is void to that extent.

Congress, in passing Section 56, broadened the jurisdiction of actions under the Federal Employers Liability Act, whereas an employer could previously only be sued in the district court of its residence, said section now provides that it may be sued in the district court of the residence of defendant, or in which the cause of action arose or in which defendant shall be doing business at the time of the commencement of such action.

Clearly, this section gave the employee substantial benefits and created a liability against the employer. He had now no choice or privilege as to where he could be sued, he was subject to suit in any of said districts mentioned. While it is true that the employee had the privilege to sue in any of said districts, he had a right to exercise said privilege in selecting said jurisdiction free and unhampered by an interference from the employer. That said provision [fol. 46] relative to venue created a liability on the part of the employer, is recognized by the employer himself when he seeks by agreement with the employee to limit the place of venue. The employer recognized the fact that said section does create a liability in that it gives the employee a right to choose between two or more jurisdictions, and to start his suit in the jurisdiction that is the most advantageous to himself.

The plaintiff recognized this fact and sought by said agreement to limit the jurisdiction to the county or district in which the injury occurred, and in which the employee lived.

The allegations of plaintiff's bill also recognized that the provisions of Section 56 create a liability on its part as it alleges that the bringing of the suit in the Superior Court of Cook County, Illinois, will result in great and irreparable harm to plaintiff in the way of expenses and inconvenience in preparation and trial of said suit, as all of the witnesses reside in the State of Michigan.

The very purpose of the contracts or agreements in this case is to exempt the plaintiff from liability to a suit outside of the county or district in which the defendant resided or in which the defendant resided or in which the injuries occurred, to-wit: the Circuit Court of Calhoun County, or the District Court at Detroit. It was an attempt by said agreements to limit the place of venue of said action created by

said statute and to relieve themselves of the liability created thereby, and said agreements are therefore void and do not form a basis for the injunctive relief prayed for.

The allegations in the bill of complaint, as to additional expense and inconvenience the plaintiff would be put to, in the trial of the case in the Superior Court of Cook County do not constitute grounds for injunctive relief.

[fol. 47] See Baltimore and O. R. Co. vs. Kepner, 314 U. S. 44, 62 S. Ct. 6;

Miles vs. Illinois Cent. R. Co., 315 U. S. Ct. 638, 62 U. S. Ct. 827.

The plaintiff cannot complain of the additional expense or inconvenience caused by the suit in Cook County, Illinois, as the defendant had a right to bring his suit in any jurisdiction granted him by the provisions of the Federal Employers Liability Act, and plaintiff is compelled to submit to any inconvenience resulting therefrom.

I therefore find that the plaintiff's bill of complaint does not set forth grounds for equitable relief; and the motion of defendant to dissolve the temporary injunction heretofore issued, and quash said summons and dismiss said suit, should be and the same is hereby granted, and the injunction dissolved, summons quashed and suit dismissed.

Dated: October 20, 1947.

Blaine W. Hatch, Circuit Judge.

[fol. 48] In Circuit Court of Calhoun County
In Chancery

Grand Trunk Western Railroad Company, a Michigan Corporation,

vs.

Alexander Boyd, Defendant

Order of Dismissal—Filed October 27, 1947

At a session of said Circuit Court, held at the Circuit Court Rooms in the City of Battle Creek, Michigan on the 27th day of October, A. D. 1947.

Present: The Honorable Blaine W. Hatch, Circuit Judge.

This cause came on to be heard upon the Motion of the above-named defendant to dismiss the plaintiff's bill of

complaint and to quash plaintiff's summons, and to dissolve the temporary injunction for plaintiff and for the defendant: and thereupon, upon due consideration thereof.

It is hereby ordered, adjudged and decreed that the said Motion be and the same is hereby allowed and adjudged to be well taken, and the said plaintiff's bill of complaint is hereby dismissed, the plaintiff's summons heretofore issued in said cause is hereby quashed, and the plaintiff's temporary injunction heretofore issued in said cause is hereby dissolved.

[fols. 49-50] It is further ordered, adjudged and decreed that the said defendant recover his costs of said Motion against the said plaintiff to be taxed, and have execution therefor.

Blaine W. Hatch, Circuit Judge.

In Circuit Court of Calhoun County

Certificate of Court

I hereby certify that the foregoing record contains all the pleadings in said cause, and all matters and things which in any manner affect the exceptions therein noted.

I further certify that by stipulation of Counsel the time for settlement has been set as of this date.

I further certify that the Statement of Reasons and Grounds for Appeal, which are hereto annexed accompanied the case made at the time the same was signed and settled by me.

Signed this 19th day of January, 1948.

Blaine W. Hatch, Circuit Judge.

[fol. 12] IN THE SUPREME COURT, STATE OF MICHIGAN

43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

This cause will be brought on for hearing and argument at the next April term of said Court.

Yours, etc.,

George F. Gronewold, Attorney for Plaintiff and Appellant.

To Mechem & Mechem, Melvin L. Griffith and Walter N. Murray, Attorneys for Defendant and Appellee, dated March 8, 1948.

To Jay Mertz, Clerk of said Court:

Sir: You will please place said cause on the docket of this Court for said term.

George F. Gronewold, Attorney for Plaintiff and Appellant.

[fol. 13] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the ninth day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Present the Honorable George E. Bushnell, Chief Justice, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Henry M. Butzel, Leland W. Carr, Associate Justices.

43966

GRAND TRUNK WESTERN RAILROAD COMPANY,

vs.

ALEXANDER BOYD

This cause coming on to be heard is argued by Mr. Gronewold for the plaintiff and by Mr. Mechem for the defendant and is duly submitted.

[fol. 14] SUPREME COURT, STATE OF MICHIGAN

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

Before the Entire Bench—REID, J.

Plaintiff filed the bill of complaint for an injunction forbidding defendant from taking further proceedings with an action brought by defendant against plaintiff elsewhere than in the county or district where defendant resided or was injured, contrary to two agreements. From a decree dismissing the bill on motion, plaintiff appeals.

Defendant Boyd was injured on November 23, 1946, at Battle Creek, Michigan, while in the employment of plaintiff railroad company, which company was then and there operating as a common carrier in both interstate and intrastate commerce. On December 5, 1946, on request of defendant Boyd, plaintiff railroad company advanced to him $50, without admitting liability, and in consideration of the advancement defendant Boyd signed an agreement containing the following:

"If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained and not elsewhere."

On December 21, 1946, defendant Boyd, being in further need of money, requested another advancement and plaintiff railroad company thereupon furnished him an additional $50 as an advancement, in consideration of which defendant signed a further agreement containing language identical with that above quoted.

[fol. 15] Plaintiff does not dispute that defendant was injured and that when he was injured both defendant and the plaintiff railroad company were engaged in interstate commerce and that defendant's cause of action arose under the Federal employers' liability act, that defendant's injuries were such to prevent him from going back to work, that

he was without funds for living expenses, that the amount of the two payments totaling $100 it was agreed should be deducted from the final amount the plaintiff railroad company would be required to pay him in settlement or satisfaction of his judgment or otherwise.

On June 25, 1947, defendant began a suit against plaintiff railroad company in the superior court of Cook county, Illinois, to recover damages for his said injury. Plaintiff railroad company seeks to enjoin defendant from proceeding any further in said suit and alleges that it will suffer irreparable harm in — compelled to bring its witnesses to Cook county superior court; that about 10 or more competent, all living in Michigan, would be required to attend the trial outside of the State of their residence; that the expense of procuring the attendance of the witnesses in Cook county superior court would be very much greater than if the trial could be had in Michigan; that the witnesses could not be compelled to cross the State line; that many of them might refuse to attend in the State of Illinois; and that plaintiff railroad company would be put to a great disadvantage in attending at the venue chosen by defendant.

Defendant claims the two agreements to be void as contravening the provisions of the Federal employers' liability act, as amended in 1939, 45 USCA, Sections 55, 56 of which are in part as follows:

"Sec. 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any *liability* created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled to thereto on account of the injury or death for which said action was brought.

"Sec. 56. * * * Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be [fol. 16] doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the

courts of the several states, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." (Italics supplied)

Plaintiff railroad company claims that the liability mentioned in section 55 is the liability to respond in damages, and has no reference to venue. Plaintiff further claims that by the two contracts the liability remains unchanged and that only the venue is affected. Plaintiff further claims that the word "liability" italicized in the above quotation of section 55 means the liability created in section 51 of the same chapter, the Federal employers' liability act, as amended in 1939, 45 USCA, Section 51, which reads in part a follows:

"Every common carrier (engaged in interstate commerce) * * * *shall be liable in damages* to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Italics supplied.)

Plaintiff further claims that the provisions of section 55 are aimed at a present evasion of a future occurring liability and not at a compromise or settlement of an already accrued cause of action.

We must consider the meaning of the word "liability" as used in section 55 in question, and on the determination of the construction to be given that word will depend the result of this case.

Webster's New International Dictionary (2d Ed.), Unabridged, gives the following definition of "liability":

"1. State or quality of being liable; as, *liability* of an insurer.

"2. That which one is under obligation to pay, or for which one is liable. * * *

"3. • • • A debt; an amount which is owed."

"'Liabilities' are the antithesis of 'assets'." *Lovejoy v. Inhabitants of Foxcroft*, 91 Me. 367 (40 Atl. 141, 147), cited in 25 Words and Phrases (Perm. Ed.), p. 59.

Our attention has not been directed to any case which uses the word "liability" as meaning venue, excepting the four [fol. 47] cases cited by defendant: *Peterson v. Ogden Union Railway & Depot Co.* — Utah — (175 Pac. (2d) 744); *Sherman v. P. M. Ry. Co.*, 62 Fed. Supp. 590; *Fleming v. Husted*, 68 Fed. Supp. 900; and *Krenger v. Pennsylvania R. Co.*, 8 F. R. D. 65.

To an effect contrary to the above four cases, the following construe the word liability in such a manner as to result in upholding the two contracts in question: *Detwiler v. Lowden*, 198 Minn. 185 (269 N. W. 367); *Detwiler v. Chicago R. I. & P. Ry. Co.*, 15 Fed. Supp. 541; *Clark v. Lowden*, 48 Fed. Supp. 261; *Herrington v. Thompson*, 61 Fed. Supp. 903; *Roland v. Atchison, T. & S. F. Ry. Co.*, 65 Fed. Supp. 630; *Akerly v. N. Y. Cent. R. Co.*, 73 Fed. Supp. 903 (16 L. W. 2175).

There are reasons why Congress should interest itself in prohibiting contracts that would evade liability for damages or contracts requiring employees to waive such liability as a condition of employment; but there is no apparent reason why Congress should interest itself in prohibiting a fair and reasonable contract made without fraud after a cause of action has accrued. The two contracts in question would serve the convenience of both parties and give the defendant a choice between the circuit court of Calhoun County and the Federal court of the western district of Michigan, either of which forums would afford to the defendant a full and complete remedy. The act of defendant in bringing the suit in the Chicago court as described in the declaration savors strongly of nuisance value.

If Congress by using the word liability in section 55 had intended to include venue, such intent could have been readily and clearly expressed. It is to be noted that Congress did not say "exempt itself from any of the provisions of this chapter," but Congres says only "from any liability created by this chapter."

Section 51 of the chapter (hereinbefore quoted) declares the matters for which the employer is "liable" and that liability is for injuries sustained by an employee. That

liability in its various forms is plainly the liability contemplated in section 55 in question.

In respect to civil (as distinguished from criminal) cases, the common meaning of "liability" is that it is an obligation to pay a debt or amount owed and does not include venue. [fol. 18] While there is a conflict in the authorities, in construing the section in question, section 55, we give to the word liability simply its plain and almost universally accepted meaning. We find that the weight of authorities sustains contracts of the nature of the contracts in question.

Venue may be waived.

"Venue relates to the convenience of litigants, and therefore may be waived by them. * * * The right to have a case heard in the court of proper venue may be lost unless seasonably asserted. * * * The right to have a case heard in the court of proper venue may be waived by any party, including the government." *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (syllabi L. Ed.), 324 U. S. 635, 636 (65 Sup. Ct. 821, 89 L. Ed. 1241, 1242).

For the foregoing reasons, we consider that the two contracts in question are legal and binding on the defendant.

The decree appealed from is reversed and a decree will be entered in this Court restoring *and* temporary injunction as granted by the lower court, and remanding the cause to the lower court for further proceedings. No costs, a question of public importance being involved.

Bushnell, C. J., and Sharpe, North, Dethmers, and Carr, JJ., concurred with Reid, J.

Boyles, J. (concurring):

Section 6 of the Federal employers' liability act on which Boyd relies for venue in Illinois was enacted in 1910. It was in effect in 1934 at the time of this Court's decision in *Pere Marquette R. Co. v. Slutz*, 268 Mich. 388. Nor has it been changed since. The *Slutz Case*, *Supra*, is bottomed on a statute of this State referring to procedure in the courts of this State on causes of action arising in this State. It is controlling here and the circumstance that there is a contract which is in accord with the statue merely adds support to that conclusion.

In *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (62 Sup. Ct. 6, 86 L. Ed. 28, 136 A. L. R. 1222), there was neither

a State statute nor a contract, and the case is not controlling here. For the above reasons I concur in the opinion of Mr. Justice Reid.

Bushnell, C. J., and Butzel, J., concurred with Boyles, J.

[fol. 19] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-ninth day of June, in the year of our Lord one thousand nine hundred and forty-eight.

Present the Honorable George E. Bushnell, Chief Justice, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Henry M. Butzel, Leland W. Carr, Associate Justices.

43966

GRAND TRUNK WESTERN RAILROAD COMPANY, Plaintiff and Appellant;

vs.

ALEXANDER BOYD, Defendant

This cause having been brought to this Court by appeal from the Circuit Court for the County of Calhoun, in Chancery, and having been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the Court, that the decree of the Circuit Court for the county of Calhoun, in Chancery be and the same is hereby reversed, vacated and held for naught, and it is further ordered that the temporary injunction, as granted by the lower Court, be and the same is in all things restored, and the cause remanded to the lower Court for further proceedings. It is further ordered that no costs be awarded herein.

STATE OF MICHIGAN, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that

it is a true transcript therefrom, and the whole of said original decree.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Jay Mertz, Clerk.

[fols. 59-61] IN THE SUPREME COURT OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge.

[Title omitted]

APPLICATION FOR REHEARING

To the Honorable Judges of the Supreme Court of Michigan:

Now comes Alexander Boyd, Defendant-Appellee in the above cause, by Mechem & Mechem, his attorneys, and presents herewith his application for a rehearing of said cause and respectfully prays that a Rehearing be granted in said cause upon the grounds and for the reasons hereinafter set forth.

Mechem & Mechem, Attorneys for Defendant Appellee.

[fol. 62] MAY IT PLEASE THE COURT:

I

A rehearing should be granted because the question involved in the case at bar, is controlled by a contrary decision, involving the same question, just rendered by the United States Circuit Court of Appeals, 6th Circuit.

This cause was argued before this Honorable Court on April 9, 1948. The opinion of this Court was filed June 29, 1948.

Subsequent to the argument, to-wit: on June 14, 1948, the United States Circuit Court of Appeals, Sixth Circuit, rendered decision in the case of *Akerly* v. *New York Central Railroad* reversing, on appeal, the United States District Court for the Northern District of Ohio, Eastern Division. The decision of the District Court is reported in 73 Fed. Supp. 903. The decision in the United States Circuit Court of Appeals is not yet reported, to the best of our information and belief; but a copy of it has been obtained and is attached to this application as Exhibit 1, and incorporated herein by reference.

The United States District Court in the *Akerly* case Held (as did this Court) that a contract limiting venue, made after the cause of action arose, was valid and not in con-

travention of Section 5 of the Federal Employers' Liability Act. (45 U.S.C.A. Sec. 55).

The United States Circuit Court of Appeals in the *Akerly* case reversing this decision Held (relying on *Duncan* v. *Thompson*, 315 U. S. 1, 86 L. Ed. 575) that such contract was in contravention of Section 5 of said Act and there-[fol. 63] fore void. It further Held that Section 6 of said Act, which enlarged the employee's choice of venue, created a "liability" on the carrier employer; that such "liability" was within the provisions of Section 5 of said Act, which makes void any "contract or device" by which the carrier seeks to exempt itself in whole or in part from such "liability".

Prior to June 14, 1948, there was no ruling on this point by any Federal Court in Michigan. By the United States Circuit Court of Appeals in the *Akerly* case, the federal rule is now settled in all territory embraced within the jurisdiction of such Circuit Court of Appeals, which includes Michigan.

Brazel v. *Thompson*, 141 Mich. 628, 634.

Whenever Congress enacts a statute under the Commerce Clause, such law, when enforced in both state and federal courts, must be construed in the light of federal decisions, and the decisions of the State courts must conform to the interpretation of the Federal court prevailing in the jurisdiction which includes such state.

Brazel v. *Thompson*, supra;
Howe v. *Railroad Co.*, 236 Mich. 577, 587;
Bement v. *G. R. & I. Ry.*, 194 Mich. 64;
Lynn v. *Clark*, 124 Mich. 190;
Jorgensen v. *G. R. & I. Ry.*, 189 Mich. 537;
Gaines v. *Grand Trunk R. R.*, 193 Mich. 398;
Nelson v. *Ironwood, etc. Ry.*, 201 Mich. 347;
People v. *Lechner*, 307 Mich. 358;
See Annotated Note, 147 A.L.R. 857.

Where the law of the case has been overruled by a subsequent decision, or by a prior decision not available to [fol. 64] or known by the court until after decision rendered, in a case involving the same question, rehearing will be granted and the former decree reversed.

Lynn v. *Clark*, *Supra*;
Staub v. *Tripp*, 253 Mich. 633;
Kavanaugh v. *Baird*, 253 Mich. 631.

II

The Court in holding that Section 5 (45 U.S.C.A. Section 45) relates solely to liability to pay damages under Section 1 (45 U.S.C.A. Section 51) overlooked or misapprehended the expressly declared purpose of Congress in passing and amending the Federal Employers' Liability Act.

1. Congress declared its own purpose in passing and perfecting the Federal Employers' Liability Act. The primary purpose was not to create liability. Liability had always existed in the common law right of action already in the possession of the injured railroad man. Congress merely took that Common Law right of action and pruned away its injustices. (Defendant-Appellee's Brief pp. 8, 12).

The Fellow-Servant Rule was abolished in Section 1 (45 U.S.C.A. Sec. 51):

> "Every common carrier by railroad while engaging in commerce between the several states • • • shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce • • • for such injury • • • resulting in whole or in part from the negligence of any of the officers, agents *or employees* of such carrier." (Italics ours).

[fol. 65] Contributory Negligence as a bar to the action was abolished in Section 3 (45 U.S.C.A. Sec. 53) and Comparative Negligence was substituted in its place.

The Assumption of Risk Doctrine was abolished in Section 4 (45 U.S.C.A. Sec. 54).

The practice of the carriers of exempting themselves from liability was outlawed in Section 5 (45 U.S.C.A. Sec. 55), in language so comprehensive as to protect every major purpose of the Act.

The injustice of requiring an injured man to sue his employer in the district of which it was an inhabitant was removed by the 1910 amendment, which was added to the Act as Section 6 (45 U.S.C.A. Sec. 56), and the injured man given three choices of a place to sue.

Section 9 (45 U.S.C.A. Sec. 59) provided for the survival of the injured person's right of action to his next of kin, which is likewise freed under the Act from those common law defenses and practices above described.

Any contract, rule, regulation or device whatsoever, the intent or purpose of which is to prevent injured employees from securing information as to the facts incident to injury are outlawed by Section 10 (45 U.S.C.A. Sec. 60).

The primary purpose of Congress, according to its own declaration, was, to the full extent of its powers, to do away with these injustices that had become attached to the common law right of action for wrongful injury like barnacles to an old ship. If, in the process, Congress created a new liability, that liability is the result of all of these major provisions and not of Section 1 or of any number of them less than all of them. Each one of these major provisions is an integral part of the whole liability. [fol. 66] As Judge Allen says in the opinion in the *Akerly* Case, hereto attached as Exhibit 1, referring to Section 5:

> "We think that the inclusion of this section in the Employers' Liability Act, with its creation of new obligations against the employer, makes the Venue Section (Sec. 6) an inherent part of the employer's liability."

2. The Court, also, overlooked the fact that the authorities on which it relies for its decision are all based upon the former rule that while contracts made before the cause of action arises are invalid as against public policy, contracts made after the cause of action has accrued are valid, and that all of those authorities were overruled on this point by the Supreme Court of the United States in *Duncan* v. *Thompson*, 315 U. S. 1, 63 Sct. 422, 86 L. Ed. 575, cited in Appellee's Brief (pp. 16, 23, 25).

3. Reference is made by Mr. Justice Boyles in a concurring opinion that the case at bar is "controlled" by *Pere Marquette Ry.* v. *Slutz*, 268 Mich. 388, decided in 1934. It is respectfully pointed out that the *Slutz* Case did not arise under the Federal Employers' Liability Act; but was merely an action for personal injuries by a man who was run into by a railroad train. Neither do the provisions of the Michigan Judicature Act referred to in the *Slutz* case affect the case at bar. The federal statute in respect to venue of causes arising under the statute is controlling. The decisions of state courts, under the Federal Employers' Liability Act, must be in accord with the

federal statute and the federal rule as to its application, rather than state statute, rule or policy.

[fol. 67] *Baltimore & Ohio Ry.* v. *Kepner*, 314 U. S. 44, 86 L. Ed. 28;

Miles v. *Illinois Central R. R.*, 315 U. S. 698, 86 L. Ed. 1129.

Conclusion

We respectfully submit that the controlling authority of the United States Circuit Court of Appeals in the *Akerly* Case, and the misapprehension of this Court of the scope and meaning of the Federal Employers' Liability Act and of the decisions of the United States Supreme Court construing same, require this Court to grant a rehearing for reconsideration of its decision and final affirmance of the judgment of the trial court.

Respectfully submitted, Mechem & Mechem, Attorneys for Defendant and Appellee.

Melvin L. Griffith, Walter N. Murray, of Counsel.

[fol. 68] Exhibit I to Application for Rehearing

In United States Circuit Court of Appeals, Sixth Circuit

No. 10585

Blaine F. Akerly, Appellant,

vs.

New York Central Railroad Company, Appellee

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

Decided June 14, 1948

Before Allen, McAllister and Miller, Circuit Judges

Allen, Circuit Judge. This is an appeal from an order of the District Court sustaining a motion to dismiss an action for personal injuries, upon the ground of improper venue. The facts are presented mainly by deposition and physical exhibits, and are not controverted.

[fol. 69] The appellant was employed by the appellee as an engine hostler. He was injured in Wesleyville, a suburb of Erie, Pennsylvania, while working on the tender of a locomotive. He filed an action alleging that while he was engaged in filling the tender with water, the locomotive was suddenly started without warning, causing him to be seriously injured.

The case arises under the Federal Employers' Liability Act, 45 U.S.C., 51 et seq.

The accident occurred on May 14, 1945, and appellee's claim agent called upon the appellant several times, in the course of which negotiation appellant asked for some money as an advance for "living expenses". Appellant's claim agent said: "He asked me if we could help him out • • • he asked me if the company would allow him something to help him out on his expenses • • • I told him I would put it up to the company to see what they would be willing to do • • • I believe he asked for 50 or 75 dollars. • • • I told him I would try to get the money for him." The claim agent testified that a couple of weeks later "after some little preliminary conversation I told him that the company had made an allowance of fifty bucks • • • for expenses; to help him out on his expenses."

The claim agent brought the appellant $50 for living expenses, and at the same time told him that "in order to get this money we would have to have a little agreement signed up." The appellant read and signed the following agreement:

[fol. 70] "AGREEMENT FOR ADVANCEMENT OF FUNDS" —

"At my request, the New York Central Railroad Company has advanced to me the sum of Fifty Dollars ($50.00), receipt of which is hereby acknowledged, for living and other expenses while I am disabled from work by reason of personal injury sustained by me; at or near Wesleyville, Pa., on or about the 14th day of May, 1945.

"In consideration of said advancement, I agree with the said Railroad Company that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation. If my claim cannot be so adjusted, then in further consideration of said advancement, I promise and agree that I will not start suit against the said Railroad Company to recover damages for my injuries

in any courts, either Federal or State, except those sitting within the State where my injuries were sustained or within the State where I resided at the time of my injury, and I covenant with the said The New York Central Railroad Company that I will not start suit against it for damages on account of my said injuries in any court sitting outside of the State of my residence at the time of the said injuries or outside of the State wherein my said injuries occurred.

"Dated at Erie, Pa., this 18th day of February, 1946.

"Blaine F. Akerly."

It does not appear that any later advance of expenses was made, and on January 31, 1947, the appellant filed an [fol. 71] action in the Northern District of Ohio, Eastern Division. A motion to dismiss was filed, based upon the above agreement, and the District Court dismissed the action.

The appellant contends, (1) that the agreement was void under Sect. 5 of the Federal Employers' Liability Act, 45 U.S.C., sect. 55, and, (2) that it was void for want of consideration.

The pertinent portions of Sect. 5 and 6 of the statute read as follows:

> Sec. 5. "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."
>
> Sec. 6 • • •
>
> "Under this chapter an action may be brought in a district court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

[fol. 72] As is evident, Sec. 6 of the Act gives an injured railroad employee three separate and distinct choices as to the district in which he will file his action.

The contract signed by appellant agreed that the suit should be filed only in the district where the appellant was injured, and the principal question is whether this contract attempted to exempt the appellee from any liability created by the Act.

The Employers' Liability Act of 1908, which was held valid in the Second Employers' Liability Cases, 223 U. S. 1, did not include the present venue provisions of Sect. 6. Venue under that Act was covered by the general provisions of the federal venue statutes, 28 U.S.C., Sec. 112. The present provision was added by amendment in 1910, and as declared in *Baltimore & Ohio Rd. Co.* v. *Kepner*, 314 U. S. 44, 53, the statute was broadened because "the general venue provisions worked injustices to employees." The later and broader venue provisions were in large part waived by the appellant in the contract signed in connection with the advance for living expenses. If this contract, which was secured by the appellee from a man who obviously was in need of financial assistance, is a device to create exemption from liability it is invalid. *Davis* v. *Crane*, 12 Fed. (2d) 355, 358 (C.C.A. 8).

The case authority on this question is in sharp conflict. District Courts in Missouri, Illinois, and Minnesota, and the Supreme Court of Minnesota, have held that such contracts are valid. *Herrington* v. *Thompson*, 61 Fed. Supp. 903 (Mo.); *Roland* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 65 Fed. Supp. 630 (Ill.); *Clark* v. *Lowden*, 48 Fed. Supp. 261 (Minn.); *Detwiler* v. *Lowden*, 198 Minn. 185. District [fol. 73] Courts in Illinois, Minnesota, and Iowa, and the Supreme Court of Utah, have held that such contracts are invalid. *Sherman* v. *Pere Marquette Ry. Co.*, 62 Fed. Supp. 590 (Ill.); *Fleming* v. *Husted*, 68 Fed. Supp. 900 (Ia.); *Peterson* v. *Ogden Union Ry. & Depot Co.*, 175 P. (2d) 744. Cf. *Porter* v. *Fleming*, 74 Fed. Supp. 378 (Minn.). In the latter case the contract was very similar to the one herein involved. With due respect for the courts first named, we think that the latter cases state the sounder rule, and that under the clear intendment of the Act this contract is void.

Under the conceded facts, it is a fair inference that the appellee regarded this contract as important for the sake

of exempting itself from the liability of being sued in New York, the state of its residence, or in any of the states, other than Pennsylvania, where it does business. Section 6 creates new and important rights in the employee and it created corresponding liabilities against the employer. Appellee argues that liability, within the meaning of the Act, is the determination of the obligation of the appellee to pay damages, and that it is in no way affected by the place or forum of trial. But liability is an ordinary word, to be construed according to its ordinary meaning. The second, and more limited definition of the word, as found in Webster's Unabridged Dictionary (2d ed.), 1935, is in substance that urged by the appellee; but the first, and more inclusive definition is "The state or quality of being liable." Liable, in turn, is defined as being "bound or obliged in law or equity; responsible; * * * answerable or exposed to a certain contingency or casualty of an undesired character." Within these definitions, the appellee was liable under Sect. 6 of the Act to be sued in any one of three jurisdictions: that of its residence, that where the accident [fol. 74] occurred, that where it does business. In fact this new venue statute creates, within the ordinary meaning of the word, liability against the employer in states and districts where he could not have been sued prior to the amendment. The paragraph is broad and sweeping, and as pointed out in *Duncan* v. *Thompson*, 315 U. S. 1, the adoption of the section in its present from "argues persuasively that Congress wanted section 5 to have the full effect that its comprehensive phraseology implies." As specifically held in the cited case, Sec. 5 is applicable to existing causes of action.

We think that the inclusion of this section in the Employers' Liability Act, with its creation of new obligations against the employer, makes the venue provision an inherent part of the employer's liability. An attempt to limit it by contract is an attempt to exempt the railroad from liability and is void.

The contract signed was not a release, compromise or settlement of the cause of action, either in whole or in part, and therefore *Callen* v. *Pennsylvania Rd. Co.*, 332 U. S. 625, relied on by the appellee, has no application.

Also we think that public policy prohibits the recognition and enforcement of such contracts limiting the right of parties in their access to the courts. Like the rights be-

stowed upon employees under the Fair Labor Standards Act, the rights of the employee under the Federal Employers' Liability Act were "statutory rights conferred upon private parties but affecting the public interest." It was held in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, that such rights may not be released or waived.

[fol. 75] The contract to waive the venue provisions is of no effect also because there was no consideration for it. The District Court agreed that the sum paid was not in itself consideration, since it was to be considered an advance, and hence was deductible from the amount of the final settlement. The finding that the sum was to be considered an advance is clearly correct, for the railroad, which drew the contract, headed it "Agreement for Advancement of Funds," and stated that at appellant's request the railroad had "advanced" the sum of $50. The specific provision of Sec. 5 of the Act making this amount deductible from the final settlement, under the well-established rule, is read into and made part of the contract of the parties. In light of this finding, and in view of the appellee's acknowledgement, implicit in the wording of the contract which it secured, that it owed the appellant more than $50, nothing was paid for the promise to limit the venue.

The judgment of the District Court is reversed and the case is remanded for further proceedings in accordance with this opinion.

MILLER, Circuit Judge, dissenting:

The case involves a question of venue, rather than jurisdiction or liability. It is settled that venue provisions, being for the benefit of the parties, can be waived. *Neirbo Co. vs. Bethlehem Shipbuilding Corp.*, 308 U. S. 165.

Regardless of statutory venue provisions, the parties can select their trial court, provided the court selected has jurisdiction of the subject matter and the defendant, See *Industrial Association vs. Commissioner*, 323 U. S. 310, 313. Unless Section 5 of the Act changes the rule in this particular type of case, the agreement in this case, if supported by consideration, is valid.

[fol. 76] I do not construe a contract, merely restricting venue not unreasonably as being a contract or device by the carrier "to exempt itself from any liability created by"

the act. *Herrington vs. Thompson*, 61 Fed. Supp. 903, 904; *Clark vs. Lowden*, 48 Fed. Supp. 261; *Roland vs. Atchison, T. & S. F. Ry. Co.*, 65 Fed. Supp. 630. Under such a contract the carrier's "liability" in its entirety still exists, and can be enforced by the employee in a court provided by the statute. The statute gives the employee a selection of venue, which selection is exercised when suit is filed. Under the contract in question he makes the selection at an earlier time. No question is involved about the selection being an unreasonable one, or operating as a hardship in any way on the employee, or being procured by fraud, misrepresentation, or duress in any degree.

Exemption from liability is entirely different from a settlement, either in whole or in part, of an existing liability. See *Bay State Dredging & Contracting Co. vs. Portz*, 156 Fed. (2d) 827, 832; *Duncan vs. Thompson*, 315 U. S. 1. In *Callen vs. Pennsylvania R. R. Co.*, 332 U. S. 625, the Supreme Court held that a release secured by a carrier of an existing liability under the Act was not a device to exempt itself from liability barred by Section 5 of the Act. The majority opinion in the present case construes the venue provisions of Section 5 as part of the carrier's "liability" under the Act. If the carrier's entire liability can be settled, it would seem that a portion of it could likewise be settled.

I also believe that the contract is supported by consideration. The $50.00 was not a part payment of any admitted liability, but was advanced "for living and other expenses." There is no provision that it was to be credited on any judgment or settlement that the em- [fols. 77-78] ployee might obtain. In any event, there was no obligation on the carrier to pay *at that time* whatever ultimately might be agreed upon or adjudged by the court. Payment in advance of the time when it is legally due constitutes good consideration.

[fol. 21] PROOF OF SERVICE

Cal, No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

COUNTY OF KENT, ss:

Ethel J. Klaassen, being duly sworn, deposes and says that she is an employe of The American Brief and Record Company of Grand Rapids, Michigan; that pursuant to instructions from John Mechem, one of the attorneys for Defendant and Appellee, and on behalf of said attorney, she did on the 16th day of July, A. D. 1948, serve copies of Application for rehearing in the above entitled cause upon the following parties, by mailing same at Grand Rapids postoffice, postage prepaid, and addressed as follows:

24 copies to: Mr. Jay Mertz, Clerk, Supreme Court, Lansing, Michigan.

1 copy to: George F. Gronewold, 1514 Security Nat'l Bank Bldg., Battle Creek, Michigan.

1 copy to: H. Victor Spike, 441 E. Jefferson Ave., Detroit, Michigan.

1 copy to: Forbes B. Henderson, 441 E. Jefferson Ave., Detroit, Michigan.

Ethel J. Klaassen.

Subscribed and sworn to before me this 16th day of July, A. D. 1948. Anne M. Noel, Notary Public, Kent County, Mich. My commission expires June 15, 1952.

[fol. 22] [Stamp:] Received Jul. 24, 1948. Jay Mertz, Clerk, Supreme Court

IN THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Cal. No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

OBJECTIONS TO APPLICATION FOR REHEARING

George F. Gronewold, Attorney for Plaintiff and Appellant, 1514 Security Nat'l Bk. Bldg., Battle Creek, Michigan.

H. Victor Spike, Forbes B. Henderson, Of Counsel, 441 E. Jefferson Avenue, Detroit, Michigan.

[fol. 23] May it Please the Court:

A rehearing should be denied for the reasons that no new facts are presented, nothing new has been added except citing one more decision (Akerly vs. New York Central) upholding the theory of Defendant and Appellee, which theory has been rejected by this Honorable Court.

The agreement in the Akerly case is quite different from those involved in the instant case, and this probably had some bearing on Judge Allen's conclusions that the agreement was without consideration. There the advancement in reality was nothing but a gift because nothing was said about refunding it out of any future settlement or judgment. It contained no reservation of the question of liability as does ours.

The weight of authority is to the effect that this Honorable Court is not bound by the decisions of the United States District Courts or Circuit Courts of Appeal, and I refer

to the same volume of Appellee's citation: Home Insurance Company of New York vs. Northern Pacific Railway Company, 147 A. L. R. 849, at page 855, a Washington Supreme Court decision:

> "When a federal statute is construed by a United States Court of Appeals, such construction is entitled to great weight with us when the same statute is involved in a case we are considering, *but it is not binding on us if we do not deem it logical or sound.* There are some cases and texts which state broadly that the decisions of "federal courts" construing federal statutes are binding on the state courts, but an examination of them will disclose that what is referred to is the United States Supreme Court, not the federal courts generally. We have found no case in which the question has been squarely presented holding that decisions of the inferior federal courts on any federal question are binding on the state courts, or are anything more than persuasive and entitled to great weight." (Italics supplied.)

See also Annotations on the same subject: 147 A. L. R. at page 858 for the weight of authority and majority view holding that state courts are not bound by the decisions of the lower federal courts even though a federal question is involved.

[fol. 24] The Federal Statute (Sec. 56) gives State Courts and Federal Courts concurrent jurisdiction. Appellee recognizes that the decision of one Court is not binding on another when they rely on Sherman vs. Pere Marquette, 62 F. Supp. 590, decided Oct. 2, 1945, in the Northern District Court of Illinois, Eastern Division, while on April 17, 1946, Roland vs. Santa Fe, 65 F. Supp. 630, decided in the same District Court adopted the theory of Appellant.

The Michigan cases cited by Appellee in the Application for Rehearing are governed by United States Supreme Court decisions, with one or two exceptions, and in these it is only implied that the Michigan Supreme Court might follow the decisions of the lower Federal Courts.

We contend that while the decisions of the United States Supreme Court are binding on this Honorable Court, the decisions of the lower Federal Courts are not, and this Court

can exercise its own discretion and judgment in the matter at issue.

We respectfully submit that the Application for Rehearing should be denied.

Respectfully submitted, George F. Gronewold, Attorney for Plaintiff and Appellant.

H. Victor Spike, Forbes B. Henderson, Of Counsel.

[fols. 83-85] In the Supreme Court of Michigan

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

[Title omitted]

Appellee's Reply to Appellant's Objections to Appellee's Application for Rehearing

We must respectfully point out two erroneous statements or concepts in Appellant's Objections, viz:

I

Appellant refers to the case of *Akerly vs. New York Cent. R. R.*, 73 F. Supp. 903 (reversed by the United States Circuit Court of Appeals, 6th Circuit, June 14, 1948, not yet reported—decision of the Court of Appeals shown as Exhibit 1, Appellee's Application for Rehearing). [fol. 86] Appellant states that the agreement in the *Akerly* Case differs from the agreement in the case at bar, because the *Akerly* agreement did not state that the amount advanced the employee could be deducted from the amount finally paid him for his injuries. However, the Federal Employers' Liability Act (45 U. S. C. A. Sec. 55) specifically states that such payments shall be deducted.

As the United States Court of Appeals points out, in the *Akerly* Case:

> "The specific provision of Sec. 5 of the Act (45 U. S. C. A. Sec. 55) making this amount deductible from the final settlement, under the well established rule, is read into and made part of the contract of the parties."

In the case at bar, the question whether the two payments of $50,00 each to Boyd were a valid consideration for the venue-limiting agreements, can only properly be raised when the parties plead to the merits, in the trial court finally found to possess jurisdiction of the action. The jurisdictional question (whether the Michigan Chancery Court can enjoin the law action in the Illinois State Court under the federal statute) must first be disposed of.

The United States Circuit Court of Appeals, 6th Circuit, decided that question adversely to the appellant in the *Akerly* Case. We quote from that decision:

> "The contract signed was not a release, compromise or settlement of the cause of action either in whole or in part and therefore *Callen v. Pennsylvania Rd. Co.* 332 U. S. 625, relied on by the appellee, has no application.
>
> "Also we think that public policy prohibits the recognition and enforcement of such contracts limiting [fol. 87] the right of parties in their access to the courts. Like the rights bestowed upon employees under the Fair Labor Standards Act, the rights of the employee under the Federal Employers' Liability Act, were 'statutory rights conferred upon private parties but affecting the public interest'. It was held in *Brooklyn Savings' Bank v. O'Neil*, 324 U. S. 697, that such rights may not be released or waived."
>
> *Akerly vs. New York Central R. R.*, U. S. Circuit Court of Appeals, 6th Circuit, June 14, 1948. Not yet reported.

II

The case of *Home Ins. Co. vs. No. Pacific Ry.*, 140 P. (2d) (Wash.) 507, cited by Appellant in its Objections, is not in point.

That decision, by the Washington Supreme Court, merely held that it was not bound to follow the federal decision in *China Fire Ins. Co. vs. Davis*, 50 F. (2d) 389, which was in the United States Circuit Court of Appeals, for the *Second* Circuit. The State of Washington is in the *Ninth* United States Judicial Circuit. The question whether the Washington Supreme Court would be bound by a decision on a federal statute by the United States Circuit Court of Appeals, *Ninth* Circuit, was not involved in, nor decided by, the *Home Ins. Co.* Case.

It is manifest that, if there are to be two contrary rules of interpretation of a federal statute in the same *federal district or circuit*—one by the federal courts of that district or circuit, and the contrary by the state courts in the *same* district or circuit—intolerable confusion will result.

[fol. 88] It would be a solemn and serious act for the Michigan Supreme Court to create such confusion, by finally determining the case at bar directly at variance with the 6th Circuit Court of Appeals in the *Akerly* case.

It would require this honorable court to overturn a long series of cases and an established rule of law in this state. Michigan has never followed the rule expounded in the *Home Ins. Co.* Case. It has held to the contrary many times.

Brazil vs. Thompson, 141 Mich. 628 (1905), was assumpsit for patent royalities. The United States (then) Circuit Court in Michigan had held the patent valid in 1889. The United States Circuit Court in Wisconsin had held the patent invalid in 1898. Judgment for the patentee was affirmed, this court saying:

> "Undoubtedly, the effect of the decree of the United States Circuit Court for the western district of Wisconsin was final within the territory over which its jurisdiction extended, and, in the absence of the prior decree of the United States circuit court for the eastern district of Michigan, it would have been of high persuasive and, perhaps, controlling force throughout the land. But the former court could not invalidate the decree of the latter court, save in its own territory, and notwithstanding its decree, the plaintiff's patents remained valid within the territory, subject to the jurisdiction of the Federal court in Michigan, and inconcluded, save only in the territory of the Wisconsin Court, until the questions at issue should be settled by the decision of the Supreme Court of the United States."

Brazil vs. Thompson, 141 Mich. at page 634.

The Federal Employers' Liability Act has been considered by this court.

[fol. 89] "Whenever congress enacts statutes pursuant to its power under the commerce clause, such laws, when enforced in both State and Federal courts, must be construed in the light of Federal decisions, and the decisions of the State courts do not govern

if they differ therefrom. See 1 Roberts' Federal Liabilities of Carriers, Sec. 557, and cases there cited."

Howe vs. Railroad Co., 236 Mich. at page 587.

"The statute in question being a Federal statute, we should be governed in its construction by the decisions of the Federal courts. No decision of the United States Supreme Court involving the precise question has been called to our attention."

Bement vs. Gd. Rapids Etc., R. Co., 194 Mich. at pages 65 and 66.

"This action being brought under the so-called Federal Employers' Liability Act of 1908 and amendments thereto, that statute and decisions of the Federal courts upon it are controlling."

Gaines vs. Grand Trunk R. Co., 193 Mich. at page 405.

"Is the defendant a 'common carrier by railroad' within the meaning of the Federal Employers' Liability Act? In the determination of this question, and in attempting to ascertain what the legislative intent of congress was in passing the act in question, we will necessarily be governed by the Federal decisions."

Nelson vs. Ironwood etc., Co., 204 Mich. at page 351.

"Congress is given power to regulate commerce between the States, and when it has acted, as in passing the Federal Employers' Liability Act, such enactment [fol. 90] becomes the general law of the land and supersedes all State laws upon the same subject."

Jorgenson vs. Grand Rapids etc., R., 189 Mich. at page 539.

Conclusion

We respectfully believe that this honorable court should and will reverse its decision of June 29th in the case at bar, in the light of the final holding in the *Akerly* case, and because of it.

Respectfully submitted, Meehem & Meehem, Attorneys for Defendant and Appellee.

Melvin L. Griffith, Walter N. Murray, of Counsel.

[fol. 26] (Original to Clerk, Supreme Court)

Proof of Service

Cal. No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

COUNTY OF KENT, ss.

Ethel J. Klaassen, being duly sworn, deposes and says that she is an employe of The American Brief and Record Company of Grand Rapids, Michigan; that pursuant to instructions from John Mechem, one of the attorneys for Defendant and Appellee, and on behalf of said attorney, she did on the 28th day of July, A. D. 1948, serve copies of Appellee's Reply to Appellant's Objection to Application for Rehearing in the above entitled cause upon the following parties, by mailing same at Grand Rapids postoffice, postage prepaid, and addressed as follows:—

24 copies to: Mr. Jay Mertz, Clerk, Supreme Court, Lansing, Michigan.

2 copies to: H. Victor Spike, Forbes B. Henderson, 441 E. Jefferson Ave., Detroit, Michigan.

1 copy to: George F. Gronewold, 1514 Security Nat'l Bank Bldg., Battle Creek Michigan.

Ethel J. Klaassen.

Subscribed and sworn to before me this 28th day of July, A. D. 1948. Anne M. Noel, Notary Public, Kent County, Mich. My commission expires June 15, 1952.

[fol. 27] At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourth day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Present the Honorable George E. Bushnell, Chief Justice; Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Henry M. Butzel, Leland W. Carr, Associate Justices.

43966

GRAND TRUNK WESTERN RAILROAD COMPANY,

vs.

ALEXANDER BOYD

A motion for rehearing having been heretofore submitted herein, it is hereby denied, with costs to plaintiff.

STATE OF MICHIGAN, ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Jay Mertz, Clerk. (Seal.)

[fol. 28] IN THE SUPREME COURT, STATE OF MICHIGAN.

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

Notice of Motion

To: George F. Gronewold, Attorney for Plaintiff and Appellant. Business Address: 1514 Security Bank Building, Battle Creek, Michigan.

H. Victor Spike, Forbes B. Henderson, of Counsel. Business Address: 441 E. Jefferson Avenue, Detroit, Michigan.

SIRS:

You will please to Take Notice that the annexed is a copy of a motion this day filed in the above entitled cause, and that annexed hereto is copy of the affidavit this day filed in said cause upon which said motion is based; and that said motion will be brought on for hearing in said Supreme Court on Tuesday, the 19th day of October, 1948, at the opening of said Court on said day, or as soon thereafter as counsel can be heard.

Dated: October 11, 1948.

Mechem & Mechem, by J. L. Mechem, Attorneys for Defendant and Appellee. Business Address: 804 Michigan National Bank Building, Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel. Business Address: 139 North Clark Street, Chicago 2, Illinois.

[fol. 29] In the Supreme Court, State of Michigan

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

Grand Trunk Western Railroad Company, a Michigan Corporation, Plaintiff and Appellant,

vs.

Alexander Boyd, Defendant and Appellee

Motion for Stay of Proceedings Pending Application for Writ of Certiorari to the Supreme Court for the United States

Comes now Alexander Boyd, the above-named appellee, by Mechem & Mechem, his attorneys, and moves this honorable Court to enter its order staying all proceedings under its decree in the aforesaid cause pending the appeal of said cause, and until the further order of this court, or of the Supreme Court of the United States, for the following reason:

Said appellee is preparing and is about to file his application to the Supreme Court of the United States for a Writ of Certiorari from said Court in said cause.

Mechem & Mechem, by J. L. Mechem, Attorneys for Defendant and Appellee. Business Address: 804 Michigan National Bank Building, Battle Creek, Michigan.

Melvin L. Griffith, Walter N. Murray, of Counsel. Business Address: 139 North Clark Street, Chicago 2, Illinois.

[fol. 30] IN THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF MICHIGAN,
County of Calhoun, ss:

J. L. Mechem, being first duly sworn, deposes and says:

That he is one of the attorneys of record for Alexander Boyd, the above-named appellee;

That deponent has been instructed to prepare and file on behalf of said appellee an appeal from the decree of the Supreme Court of Michigan to the Supreme Court of the United States in the aforesaid cause; and deponent is now preparing and is about to file application to the Supreme Court of the United States for its Writ of Certiorari in the aforesaid cause;

That it is necessary and proper that all proceedings in the aforesaid cause be stayed by order of the Supreme Court of Michigan pending such appeal to the Supreme Court of the United States.

J. L. Mechem.

Subscribed and sworn to before me this 11th day of October, A. D. 1948. Sadie S. Clemons, Notary Public in and for the County of Calhoun, State of Michigan. My commission expires Feb. 12, 1949.

[fol. 31] IN THE SUPREME COURT, STATE OF MICHIGAN

Appeal from the Circuit Court of Calhoun County

Hon. Blaine W. Hatch, Presiding Judge

Calendar No. 43966

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation, Plaintiff and Appellant,

vs.

ALEXANDER BOYD, Defendant and Appellee

PROOF OF SERVICE OF NOTICE OF MOTION

STATE OF MICHIGAN,
County of Calhoun, ss:

J. L. Mechem, being first duly sworn, deposes and says:

That he is one of the attorneys of record for Alexander Boyd, the above-named Defendant and Appellee;

That on behalf of said Appellee and on the 11th day of October, A. D. 1948, he served on George F. Gronewold, 1514 Security National Bank Building, Battle Creek, Michigan, and on H. Victor Spike and Forbes E. Henderson, 441 E. Jefferson Avenue, Detroit, Michigan, the attorneys for the above-named Plaintiff and Appellant, true copies of Motion for stay of Proceedings and affidavit in support thereof, and Notice of Hearing on said Motion, all dated October 11, 1948, by depositing same in the United States Postoffice, enclosed in sealed wrappers, addressed to said attorneys at their aforesaid business addresses, with postage thereon fully prepaid. True copies of said Motion, Affidavit and Notice are hereto annexed and incorporated herein by reference.

J. L. Mechem.

Subscribed and sworn to before me this 11th day of October, A. D. 1948. Sadie S. Clemons, Notary Public in and for the County of Calhoun, State of Michigan. My commission expires Feb. 12, 1949.

[fol. 32] At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-first day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George E. Bushnell, Chief Justice; Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Henry M. Butzel, Leland W. Carr, Associate Justices.

43966

Grand Trunk Western Railroad Company, Plaintiff and Appellant,

vs.

Alexander Boyd, Defendant

In this cause a motion is filed by defendant for a stay of proceedings, and nothing in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, It is ordered that all proceedings in said cause except the injunction (which shall remain in full force and effect) be stayed pending determination of appellees application to the United States Supreme Court for writ of certiorari.

State of Michigan, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 21st day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Jay Mertz, Clerk. (Seal.)

[fol. 33] In the Supreme Court, State of Michigan

43966

Grand Trunk Western Railroad Company, Plaintiff and Appellant,

vs.

Alexander Boyd, Defendant

In the Supreme Court, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all proceedings had and determined in the above entitled cause, by said Supreme Court, including the written decision and reasons therefor, signed by the Justices of said Court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at the City of Lansing, this 12th day of November, in the year of our Lord, one thousand nine hundred and forty-eight.

Jay Mertz, Clerk. (Seal.)

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 6, 1949

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.